**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE SIDE**

**WRIT PETITION NO. 6161 OF 2007**

Shaikh Rashid Aabdul .... Petitioner

versus

Sayyed Mustaq Salauddin & ors..... Respondent.

Shri R.V.Govilkar with Mr. Sarang Aradhye for the petitione.
Shri B.D.Joshi with Mr. Dushyant Purekar for responent no.1.

**CORAM; A.P. DESHPANDE, J.**
**DATED; 19TH OCTOBER, 2007**

**P.C.;**

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The present petitioner and the respondent no.1 herein, so also respondent no.10 had contested the Municipal Corporation Election and in the said election, the present petitioner came to be declared as elected. The election of the present petitioner has been called in question by filing an Election Petition under section 16 of the Bombay Provincial Municipal Corporation Act 1949 by the respondent no.1, wherein the present petitioner is joined as respondent no.3 and the present respondent no.10 has been

impleaded as respondent no.10 in the election petition. The respondent no.10 who has secured second largest number of votes in the said election, moved an application purportedly under Order 1 Rule 10 of CPC for his transposition as an election petitioner. The said application has been allowed by the court below which order is the subject matter of challenge in the present writ petition.

3. Perusal of the application moved by the respondent no.10 for his transposition as an election petitioner goes to state that the said respondent also wanted to file an Election petition on the same ground, on which the present Election Petition has been filed against a declaration granted in favour of the returned candidate as having been elected, but he could not do so within the stipulated period and thus a prayer is made for his transposition. Perusal of section 16 of the BPMC Act reveals in the first place that no election to any corporation shall be called in question except by an election petition and sub section (1) then lays down that any person enrolled in the muncipal election role may at any time within 10 days after the result of the election has been declared, submit an application to the Judge for determinaiton of the dispute. Reading of sub section (1) and sub section 2A brings home the position that

an election of a returned candidated can only be questioned by a person who is enrolled as a voter in the Municipal election within 10 days after the declaration of the result of the election. Thus no one can question the election of a returned candidate after a period of ten days, which is a limitation prescribed under section 16(1). On expiry of ten days from the date of declaration of the result of the election, a right to call an election in question ceases to exist in everyone who has not questioned the election within the said period. In the present case, admittedly the transposition is sought much after expiry of period of ten days. The granting of said relief enables a person to question the election of a returned candidate by filing an election petition after a period of ten days, which is contrary to the mandate of section 16(1) of the Act. It is a settled position that election law is a statute law and the statute regulates the filing of the election petition. The trial court has allowed the application by placing reliance on order 1 Rule 10 of CPC, which vests the court with an authority and jurisdiction to add or transpose parties. The learned counsel for the petitioner has submitted that CPC has no application to the poceedings in an election petition under the BPMC Act whereas the learned counsel for the respondent submits otherwise. Without going into this

controversy one thing is clear that if any provision of CPC is in conflict with the provision dealing with the election petition, then that povision of CPC cannot apply. Section 16 will over-ride the provision of CPC, even assuming that it applies. In this view of the matter, permitting transposition of respondent no.10 as petitioner, is in violation of mandate of section 16(1). The application moved by respondent no.10 ought not to have been allowed by the trial court. As the trial court has committed a patent illegality warranting interference with the impugned order in exercise of writ jurisidction I quash and set aside the impugned order. Writ peition is allowed. Rule made absolute in the above terms.

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